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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEDRA WILSON,

Plaintiff,

v.

GREATER LAS VEGAS ASSOCIATION OF REALTORS, a Nevada non-profit cooperative corporation,

Defendant.

Case No. 2:14-cv-00362-GMN-NJK

DEFENDANT'S MOTION TO DISMISS

Defendant Greater Las Vegas Association of Realtors (the "Association"), by and through its counsel, Littler Mendelson, P.C., hereby files this Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedures. This Motion is made and based upon the attached Memorandum of Points and Authorities, all other pleadings on file with the Court in this matter, and any oral argument permitted or requested by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an employment dispute. Plaintiff, an African American, alleges the Association discriminated against her because of her race by discharging her for making an accounting error that substantially increased the Association's tax liability. Instead of accepting responsibility for this

error as the former Chief Financial Officer ("CFO") for the Association, Plaintiff now blames the error on the subordinate who allegedly "provided" the information that led to the error. Plaintiff alleges the Association discriminated against her because it did not also discharge the subordinate (who is not African American). This allegation, however, is completely meritless because the subordinate is not "similarly situated" to Plaintiff, a key requirement to any discrimination claim. Recognizing this fatal deficiency, Plaintiff adopts a tactic that is well-known to the Court and the Association: she attempts to create an appearance of impropriety by asserting a plethora of unfounded allegations regarding the misconduct of various non-African American employees who were not discharged for their conduct. These allegations, however, are not helpful to Plaintiff's case because the alleged misconduct involves circumstances and individuals entirely unrelated, in every possible respect, to the events giving rise to this case. Therefore, Plaintiff's Complaint falls far short of adequately pleading a valid claim of race discrimination. Plaintiff's common law claims also fail for a variety of reasons as discussed below. Therefore, in sum, Plaintiff's Complaint is nothing more than a hodge-podge of various throw-away claims that cannot pass muster under Rule 12(b)(6).

II. PLAINTIFF'S FACTUAL ALLEGATIONS

Plaintiff was hired by the Association in July 2007 as the CFO, the position she held until her discharge in May 2013 for making a significant accounting error. Compl. ¶¶ 13-15. Plaintiff alleges a subordinate "provided" the erroneous information that led to the accounting error, and that the subordinate, who is not African American, was not discharged. *Id.* at ¶ 16(d). Plaintiff alleges, therefore, that she was subjected to different terms and conditions of employment than her subordinate. *Id.* at ¶ 16(b). Plaintiff also alleges various non-African American employees were also not discharged for a variety of alleged misconduct. *Id.* at ¶¶ 18-22. In sum, Plaintiff claims that the Association has a pattern and practice of discriminating against African Americans. This claim is meritless.

On March 10, 2014, after purportedly exhausting her administrative remedies, Plaintiff commenced this action asserting the following seven causes of action: (1) race discrimination in violation of 42 U.S.C. § 2000e-2(a) ("Title VII"); (2) race discrimination in violation of NRS 613.330(1); (3) race discrimination in violation of 42 U.S.C. § 1981; (4) negligent hiring, retention,

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and supervision; (5) intentional infliction of emotional distress ("IIED"); (6) wrongful interference with prospective economic advantage; and (7) bad faith and tortious discharge in violation of Nevada public policy. For the reasons discussed below, the Association now seeks dismissal of the Plaintiff's Complaint *in its entirety*.

III. STANDARD OF REVIEW

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rule 8 demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. "Factual allegations must be enough to rise above the speculative level." *Id.* Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal citation omitted).

In *Iqbal*, the Supreme Court recently clarified the two-step approach district courts are to apply when considering motions to dismiss. First, a district court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 1949. Second, a district court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 1949. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but not shown—that the pleader is entitled to relief." *Id.* (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, plaintiff's complaint must be dismissed. *Twombly*, 550 U.S. at 570.

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IV. ARGUMENT

A. Plaintiff's Discrimination Claims (Her First, Second, and Third Claims for Relief) Fail Because Plaintiff Does Not Adequately Allege Similarly Situated Employees Outside Her Protected Class Were Treated More Favorably Than Her

Plaintiff's First, Second, and Third claims allege the Association discriminated against Plaintiff because of her race.[1] In order to prevail on any of these claims, Plaintiff must demonstrate, among other things, that similarly-situated individuals outside her protected class were treated more favorably. *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 658 (9th Cir. 2002); *Manatt v. Bank of America, NA*, 339 F.3d 792, 797-98 (9th Cir. 2003) (applying Title VII elements to a claim brought under § 1981); *Apeceche v. White Pine County*, 615 P.2d 975, 977 (Nev. 1980) (applying Title VII elements to a claim brought under NRS 613.330(1)). To adequately plead this requirement, Plaintiff must allege other employees outside her protected class were similarly situated "in all material respects." *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006). Merely alleging "some similarities" is insufficient. *Id.* As the Ninth Circuit has stated, "individuals are similarly situated when they have similar jobs and display similar conduct." *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003).

Plaintiff's Complaint is entirely devoid of any allegation that "similarly situated" employees outside her protected class were treated more favorably. Plaintiff alleges a subordinate was responsible for the accounting error that resulted in Plaintiff's discharge, and that this subordinate, not an African American, was not discharged. Compl. at ¶ 16(d). However, this allegation fails as a matter of law to satisfy the "similarly situated" requirement because "[e]mployees in supervisory positions are generally deemed not to be similarly situated to lower level employees." *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003). In other words, because Plaintiff, as a former CFO of the Association, Compl., at ¶ 15, was in a position of "much greater responsibility" than the subordinate in question, *id.*, she is not similarly situated to the subordinate. The only other

[1] Her first claim is alleges race discrimination in violation of Title VII, her second claim alleges race discrimination in violation of NRS 613.330(1), and her third claim alleges race discrimination in violation of 42 U.S.C. § 1981.

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allegation Plaintiff makes is that various other non-African American employees engaged in misconduct but were not discharged by the Association. *Id.* at ¶¶ 18-22. However, Plaintiff does not specifically allege these employees are similarly situated, and close examination of the allegations regarding these employees reveals they did not have "similar jobs" or "did not engage in problematic conduct of comparable seriousness."[2] *Vasquez*, 349 F.3d at 641. As such, Plaintiff has not adequately pled that *similarly situated* employees outside her protected class were treated more favorably. In sum, therefore, Plaintiff cannot state a valid claim for race discrimination and her First, Second, and Third claims should be dismissed.

B. Plaintiff's Negligent Hiring Claim (Her Fourth Claim for Relief) Fails Because Plaintiff Does Not Allege Defendant Knew Or Should Have Known That The Employees In Question Had Dangerous Propensities

In order to state a valid claim for negligent hiring, Plaintiff must adequately allege, among other things, that the Association hired an employee even though it knew, or should have known, of the employee's dangerous propensities. *Hall v. SSF, Inc.*, 930 P.2d 94, 98 (Nev. 1996). This tort imposes a general duty on the Association to conduct a reasonable background check on a potential employee. *Id.* Plaintiff's allegations fail to state a valid claim for negligent hiring and demonstrate Plaintiff's fundamental misunderstanding of the nature of this claim.

Plaintiff alleges Irene Vogel, Nelson Janes, Dale Henson, Michael DellaCamera, and Krista Baker harassed Plaintiff and subjected her to disparate terms and conditions of employment. Compl. at ¶ 45. Plaintiff also alleges the Association "knew or should have known of the above actions undertaken by the aforementioned members of upper GLVAR management." *Id.* at ¶ 46. These allegations are far from sufficient to state a valid claim for negligent hiring. The mere fact that the Association hired employees that allegedly engaged in harassment and discrimination *after* they were hired does not automatically result in liability for negligent hiring. *Hall*, 930 P.2d at 98. Rather, Plaintiff must also allege that the Association hired these employees even though it knew or should have known *at the time they were hired* that these employees had a dangerous propensity to harass and/or discriminate. *Hall*, 930 P.2d at 98. However, Plaintiff's Complaint is entirely devoid

[2] For example, she alleges the Associations IT Director stole computers owned by the Association and gave them to family. Compl. at ¶ 20.

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of any such allegation. Indeed, the Complaint contains absolutely no factual allegations regarding the hiring of these employees. No allegation, for example, that the Association did not conduct a background check or that a background check, if conducted, would reveal that these employees previously engaged in harassing or discriminatory conduct. There is also no allegation that the Association failed to obtain an employment history or references from prior employers.

The only other allegation Plaintiff makes is that the Association "fail[ed] to hire appropriately qualified individuals for [the] positions" occupied by these employees. Compl. at ¶ 47. However, again, the negligent hiring claim does not require the Association to hire qualified individuals; it requires the Association to conduct a reasonable background check on applicants (whether or not qualified) and refuse to hire any applicant with dangerous propensities. *Hall*, 930 P.2d at 98 (hiring of a bouncer known to have violent propensities). Therefore, this throw-away claim must be dismissed under Rule 12(b)(6) for failure to state a valid claim for relief.

C. Plaintiff's Negligent Retention and Supervision Claim (Her Fourth Claim for Relief) Fails Because Such Claims Are Limited to Actions by a Third-Party Non-Employee

Plaintiff's Complaint also demonstrates a fundamental misunderstanding of the nature of the claim for negligent retention and supervision. In Nevada, such claims are intended only to protect *third parties* from dangerous employees acting outside the scope of their employment. *Reyes v. Southwest Gas Corp.*, No. 2:07-cv-00068-BES-LRL, 2007 U.S. Dist. LEXIS 57421, at *9 (D. Nev. Aug. 3, 2007). Indeed, the seminal Nevada case addressing this claim involves allegations that an employer's purported negligent supervision and retention of an employee resulted in a *third party* being injured by the employee. *Hall*, 930 P.2d at 99, citing 27 Am.Jur.2d Employment Relationship at 475-76 (1996); *see also Rockwell v. Sue Harbor Budget Suites*, 112 Nev. 1217, 925 P.2d 1175 (1996) (negligent hiring, training and supervision claim based upon tenant killed by security guard). Therefore, Plaintiff's claim fails as a matter of law because Plaintiff is not a third-party non-employee. Indeed, Plaintiff alleges that, *during her employment with the Association*, several Association employees harassed her and subjected her to disparate terms and conditions of *employment*. Compl. at ¶ 13, 45. Accordingly, this claim fails on its face.

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Moreover, Plaintiff's Complaint does not allege the Association's employees acted outside the course and scope of their employment. The U.S. District Court for the District of Minnesota held in *Leidig v. Honeywell, Inc.*, 850 F. Supp. 796, 806-807 (D. Minn. 1994), that the tort of negligent retention was not applicable where the alleged harmful acts were within the course of employment. In fact, liability for negligent retention is generally claimed only when an employee's actions clearly fall outside the scope of the employment relationship. *Id.* at 807. The Court in *Leidig* found that

> [A]fter an exhaustive search of the case law, in this jurisdiction and elsewhere, we have failed to uncover any decision in which the doctrine of negligent hiring or retention has been applied to conduct which arises within the course and scope of an employment relationship. This lack of precedential authority is not surprising, given the fact that the *raison d'etre* for the negligent hiring and retention doctrines was the unavailability of a recovery for conduct which was actionable under traditional principles of vicarious liability.

Id. at 807.

Here, the Complaint alleges the Association's employees caused Plaintiff's injuries while acting within the course of their employment, not by dangerous behavior outside the scope of their employment. *See e.g.*, Compl. ¶¶ 16(a)-(c), 45. In this regard, a negligent retention and supervision claim is simply not applicable here. *Leidig*, 850 F. Supp. at 806-807; *Di Cosala v. Kay*, 450 A.2d 508, 515 (N.J. 1982). Accordingly, for all the reasons stated above, Plaintiff's fourth claim for relief warrants dismissal.

D. Plaintiff's IIED Claim (Her Fifth Cause of Action) Fails Because Plaintiff Fails To Allege An Objectively Verifiable Indicia of the Alleged Distress and Because Employment Decisions Do Not Constitute Extreme and Outrageous Conduct

Plaintiff's IIED claim falls woefully short of stating a valid claim for relief. In order to state a valid IIED claim, Plaintiff must adequately allege, among other things, "severe or extreme emotional distress," which, in Nevada, requires Plaintiff to allege some "objectively verifiable indicia of the severity of [the] distress," such as plaintiff's seeking medical or psychiatric assistance. *Miller v. Jones*, 970 P.2d 571, 577 (Nev. 1998). Plaintiff clearly has not satisfied this pleading requirement. Indeed, while Plaintiff alleges, in highly conclusory terms, that she "suffered emotional distress and mental anguish," Compl. ¶ 27, and that this purported distress was

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"manifested in a number of different ways," *id.* at ¶ 56, the only allegation even remotely related to an objectively verifiable indicia of the severity of the alleged distress is the vague allegation that Plaintiff "was place on high blood pressure medication for the first time in her life," *id.* at ¶ 56. Yet, she only vaguely attributes this medication to her alleged distress and does not explicitly allege she sought medical or psychiatric for the distress. Accordingly, this claim fails because Plaintiff does not adequately allege severe or extreme emotional distress.

Moreover, Plaintiff's IIED claim also fails because personnel management decisions and activity "is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged." *Welder v. Univ. of Southern Nevada*, 833 F. Supp. 2d 1240, 1245 (D. Nev. 2011) (quotation omitted). Management decisions consist "of such actions as hiring and firing, project assignments, promotion and demotions, performance evaluations and other similar acts." *Id.* Indeed, in the recent opinion in *Garity v. APWU Nat'l Local 7156*, No. 2:11-cv-01109-PMP-CWH, 2012 U.S. Dist. LEXIS 83760, at *30 (D. Nev., June 18, 2012), the Court held that while management decisions may be "offensive, inconsiderate, and unkind," these acts "do not rise to the level of extreme and outrageous such that they exceed all bounds of decency." Here, Plaintiff alleges the Association discharged her under circumstances that did not result in discharge for Caucasian employees. Compl., at ¶ 16(d)-(e). Plaintiff also alleges the Association negligently retained various Association employees that were the source of Plaintiff's alleged injuries. *Id.* at ¶ 45. As noted above, however, these are precisely the type of employment decisions that courts have held do not rise to the level of extreme and outrageous conduct. *Garity*, 2012 U.S. Dist. LEXIS 83760, at *30. Therefore, this claim also fails as a matter of law and must be dismissed for the reasons stated above.

E. Plaintiff's Wrongful Interference Claim (Her Sixth Cause of Action) Fails Because Plaintiff Fails To Allege Defendant Had Knowledge Plaintiff Was Seeking Subsequent Employment

To establish a claim of wrongful interference with a prospective economic advantage, a plaintiff must show (1) a prospective contractual relationship between the plaintiff and a third party; (2) the defendant's knowledge of this prospective relationship; (3) the intent to harm the plaintiff by

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preventing the relationship; (4) the absence of privilege or justification by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's conduct. *Hodges v. Greenspun Media Group, LLC*, No. 2:12-cv-01337-JCM-PAL, 2014 U.S. Dist. LEXIS 26053, at *20 (D. Nev. Feb. 28, 2014).

Plaintiff alleges the Association discharged her "under circumstances that require the republication of a false, unsupported reason for [Plaintiff's] termination." Compl. at ¶ 62. This is an odd allegation given the fact that republication is not an element to a claim for wrongful interference.[3] The mere fact that Plaintiff purportedly had to republish a false reason for her termination does not automatically mean the Association intended to harm Plaintiff's prospective employment opportunities. Accordingly, this allegation is entirely irrelevant to this claim. Plaintiff also alleges the Association interfered with potential relationships with future employers by providing a false reason for her termination, when it truly dismissed her due to her race. *Id.* ¶¶ 61-64. Plaintiff fails to allege, however, that the Association had any knowledge whether or where she was seeking subsequent employment. Accordingly, Plaintiff fails to allege sufficient facts to support the second and third elements above, and dismissal is warranted.

F. Plaintiff's Tortious Discharge Claim (Her Seventh Cause of Action) Fails Because Plaintiff Does Not Identify A Public Policy Recognized By The Nevada Supreme Court As Actionable For Such Claims

"An employer commits a tortious discharge by terminating an employee for reasons that violate public policy." *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 1316 (1998). The Nevada Supreme Court has only recognized the following four public-policy reasons as actionable: (1) termination in retaliation for filing a workers' compensation claim, *Hansen v. Harrah's*, 675 P.2d 394, 397 (1984); (2) termination following a refusal to work in unreasonably dangerous conditions, *D'Angelo v. Gardner*, 819 P.2d 206, 216 (1991); (3) termination arising from whistleblowing activities, *Wiltsie v. Baby Grand Corp.*, 774 P.2d 432, 433 (1989); and (4)

[3] Republication is a theory of recovery for defamation. However, Plaintiff asserts no such claim in this case. Moreover, even assuming, *arguendo*, that Plaintiff intended to assert such a claim, the claim necessarily fails because Nevada has not adopted the republication theory for defamation claims.

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termination for refusing to participate in illegal activities, *Allum*, 970 P.2d at 1067-68.

Plaintiff's allegations do not qualify for any of the recognized public policies. First, there is no suggestion in the Complaint that Plaintiff was fired for filing a workers' compensation claim or because she refused to work in a physically dangerous environment. Thus, *Hansen* and *D'Angelo* do not apply. Second, the allegations in the Complaint do not meet the requirements for a legally-viable whistleblower claim. Such a claim requires the employee to allege that she was terminated because she reported illegal or unsafe activity to the "appropriate authorities." *Wiltsie*, 774 P.2d at 433. Internal complaints to management or the employee's boss simply do not suffice to establish a whistleblower claim. *Id.* Plaintiff does not allege in her Complaint that she was terminated because she reported illegal or unsafe activities to the appropriate authorities. She merely alleges that she "objected" to the Association's purported unlawful practices. *See e.g.*, Compl., at ¶ 72. However, mere objection to company policies is not sufficient to support a wrongful termination claim. *Bigelow v. Bullard*, 901 P.2d 630, 634 (Nev. 1995). Therefore, Plaintiff's allegations do not fall within any of the recognized public policies.

Contrary to Plaintiff's belief, there is no public policy exception for purportedly objecting to the management of a "non-profit cooperative corporation[]." Compl. ¶ 76. Accordingly, Plaintiff is asking the Court to create a new public-policy exception to the Nevada state at-will employment doctrine. In addition, she makes no showing in her Complaint that disagreeing with how a "non-profit cooperative corporation[]" is managed implicates the type of "strong and compelling public policy" that is deserving of the "rare and exceptional" decision to create a brand-new exception to the at-will employment doctrine. *Ozawa v. Vision Airlines, Inc.*, 216 P.3d 788, 791 (2009). Because Plaintiff neither demonstrates that her claim fits within any existing public-policy exception nor provides convincing grounds for a new exception, her tortious discharge claim should be dismissed.

G. Plaintiff's State Law Claims Are Barred By The NIIA's Exclusive Remedy Provision

The Fourth through Seventh claims of Plaintiff's complaint should be dismissed for the separate and additional reason that the Nevada Industrial Insurance Act ("NIIA") provides the sole remedy for any alleged harm associated with her state law claims. It is well established that the

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NIIA provides the exclusive remedy for work-related injuries. The exclusive remedy provision of the NIIA states that "[t]he rights and remedies provided in [the NIIA] for an employee on account of an injury by accident sustained arising out of and in the course of employment *shall be exclusive* . . . of all other rights and remedies of the employee . . . at common law or otherwise . . . ." NRS 616A.020(1) (emphasis added). In other words, "an employer is immune from suit by an employee for injuries 'arising out of and in the course of employment." *Wood v. Safeway*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (quoting NRS 616A.010(1)). At the pleading stage, the court determines whether the exclusive remedy provision applies – thereby barring the plaintiff's claims – by analyzing whether the plaintiff's alleged injuries "arose out of" and "in the course of" employment." *Id.*; *Conway v. Circus Circus*, 116 Nev. 870, 871, 875, 8 P.3d 837, 838, 840 (2000). As discussed immediately below, the exclusive remedy provision applies to Plaintiff's alleged injuries and, as such, Plaintiff's common law claims (her Fourth through Seventh claims) should be dismissed.

1. Plaintiff's Alleged Injuries "Arose Out Of" and "In the Course Of" Her Employment With The Association

"An injury is said to arise out of one's employment when there is a causal connection between the employee's injury and the nature of the work or workplace." *Safeway*, 121 Nev. at 733, 121 P.3d at 1032. The Nevada Supreme Court has stated that an injury arises out of plaintiff's employment if the injury occurred while plaintiff was performing her duties. *Id.* at 736, 121 P.3d at 1034. "[W]hether an injury occurs within the course of the employment refers merely to the time and place of employment, *i.e.*, whether the injury occurs at work, during work hours, and while the employee is reasonably performing his or her duties." *Safeway*, 121 Nev. at 733, 121 P.3d at 1032.

Here, Plaintiff concedes her alleged physical injuries arose out of her and in the course of her employment with the Association. Specifically, Plaintiff alleges the Association's conduct, which occurred while Plaintiff was performing her duties as CFO of the Association, "caused financial, psychological, and **physical injury** to [Plaintiff]." Compl. at ¶ 48. Accordingly, Plaintiff's injury, per her own admission, arose out of and in the course of her employment with the Association. As a result, Plaintiff's claims are barred by the NIIA's exclusive remedy provision and the Association is

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immune from suit, unless the "intentional tort" exception to the exclusive remedy provision applies. As discussed immediately below, however, the exception does not apply.

2. The Intentional Tort Exception To The Exclusive Remedy Rule Does Not Apply

Employers are not immune from suit under the NIIA's exclusive remedy provision for their intentional torts. *Advanced Countertop Design v. Dist. Ct.*, 984 P.2d 756, 758 (Nev. 1999). The Nevada Supreme Court has held, however, that bare allegations of intent are not enough – an employee "must provide facts in his or her complaint which show the deliberate intent to bring about the injury." *Id.* For example, in *Barjesteh v. Faye's Pub.*, 787 P.2d 405 (Nev. 1990), the plaintiff alleged that the majority stockholder of her employer "intentionally and 'violently' closed a refrigerator door on her arm." *Id.* at 406. The intentional tort exception does not apply to this case because Plaintiff does not allege the Association engaged in the alleged conduct with the specific intent to harm Plaintiff. Rather, Plaintiff merely alleges the Association engaged in various employment decisions that ultimately resulted in Plaintiff's injuries. Consequently, Plaintiff's common law claims (her Fourth through Seventh claims) are barred by the exclusive remedy provision of the NIIA and should be dismissed.

H. Plaintiff's Claims For Negligent Hiring, Retention, And Supervision And IIED (Her Fourth and Fifth Claims For Relief) Are Barred By The Availability Of Statutory Remedies

Plaintiff's negligent hiring, retention, and supervision and IIED claims are based upon the Association's alleged discriminatory conduct. Compl. at ¶¶ 45, 54. This is fatal to these claims. The Nevada Supreme Court has specifically held that an employee cannot maintain separate tort claims premised upon discriminatory conduct that is subject to the comprehensive statutory remedies provided by NRS 613.310 *et seq.* – Nevada's anti-discrimination statute. *Sands Regent v. Valgardson*, 105 Nev. 436, 440 (1989). In other words, because NRS 613.310 already provides comprehensive remedies for discriminatory conduct, state tort claims alleging discrimination are unnecessary and are therefore barred. *Id.* This is well-established Nevada law. *D'Angelo v. Gardner*, 107 Nev. 704, 710 (1991) (NRS 613.310 is the sole remedy available for claims based on discrimination). Moreover, the U.S. District Court for the District of Nevada has applied the same

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rationale and dismissed state tort claims when such claims were premised upon discriminatory conduct covered by federal statutes with adequate remedies. *See e.g.*, *Lund v. J.C. Penney Outlet*, 911 F. Supp. 442, 445 (D. Nev. 1996).

Plaintiff's negligent hiring, retention, and supervision claim (her Fourth Claim for Relief) is premised on the allegation that the Association did not "control its employees . . . so that [they] would not intentionally harm [Plaintiff] and other African-American employees . . . by subjecting [Plaintiff] and other African-Americans to disparate terms and conditions of employment with regarding [*sic*] to discipline and retention . . . ." Compl. at ¶ 45. In addition, Plaintiff's IIED claim (her Fifth Claim for Relief) is premised on "the above campaign of discrimination, disparate treatment, and harassment directed to [Plaintiff] and her African-American colleagues . . . ." *Id.* at ¶ 54. Accordingly, as stated above, these claims are based upon the alleged race discrimination engaged in by the Association. As such, these claims are barred as a matter of law. *Sands*, 105 Nev. at 440; *D'Angelo*, 107 Nev. at 710; *Lund*, 911 F. Supp. at 445; *Staten v. Lowe's HIW, Inc.*, No. 2:13-cv-00972-RCJ-CWH, 2013 U.S. Dist. LEXIS 132799, *6 (D. Nev. Sep. 17, 2013) (dismissing negligent training and supervision claim because "this claim does not lie in Nevada based upon statutorily improper discrimination"). Even assuming therefore that these claims do not fail under *Iqbal* and *Twombly* or are not barred by the exclusive remedy provision of the NIIA, the Court must nevertheless dismiss them as barred by the availability of statutory remedies.

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V. CONCLUSION

Based on the foregoing, Defendant the Association respectfully requests that this Court grant its Motion and dismiss Plaintiff's Complaint pursuant to NRCP 12(b)(6). The Association further requests that the dismissal be with prejudice as to Plaintiff's common law claims (her Fourth through Seventh claims) because no amendment can remedy the fact that Plaintiff's claims are barred by the exclusive remedy provision of the NIIA.

Dated: April 24th, 2014

Respectfully submitted,

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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On April 24 2014, I served the within document(s):

DEFENDANT'S MOTION TO DISMISS

☒ By CM/ECF Filing – Pursuant to FRCP 5(b)(3) and LR 5-4, the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system:

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Attorney for Plaintiff

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 24, 2014, at Las Vegas, Nevada.

Robyn Craig

Robyn Craig

Firmwide:125933954.2 077853.1001

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